(13)

No. 90-1912

In The

Supreme Court of the United States

October Term, 1991

STEPHANIE NORDLINGER,

Petitioner,

v.

KENNETH HAHN, in his capacity as Tax Assessor for Los Angeles County, and the COUNTY OF LOS ANGELES,

Respondents.

On Writ Of Certiorari To The Court Of Appeals Of The State Of California

AMICI CURIAE BRIEF OF THE AMERICAN PLANNING ASSOCIATION AND THE CALIFORNIA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF PETITIONER'S BRIEF ON THE MERITS

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AMICI CURIAE BRIEF OF THE AMERICAN PLANNING ASSOCIATION AND OF THE CALIFORNIA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF PETITIONER

I. CONSENT FOR FILING

Counsel for the American Planning Association and the California Chapter of the American Planning Association (hereinafter, the "APA") have received written consent from counsel for Petitioner Nordlinger and Respondent Hahn to the filing of this *amici curiae* brief in support of Petitioner Nordlinger. Those written consents are being forwarded to the Clerk of the Supreme Court along with this brief.

II. INTEREST OF AMICI CURIAE

The APA is a non-profit membership organization whose members consist of elected and appointed public officials, planners, architects, developers and related professionals. The majority of the California Chapter's members reside and/or practice in the State of California. The California Chapter is affiliated with the national planning organization, the APA, a non-profit organization whose members are involved in planning matters nationally. The memberships of the California Chapter and the national organization number 4,679 and 26,931 respectively.

APA's members are active in community development issues at all levels of government in California, and the membership represents all interest groups concerned

with urban and regional planning. The national organization and the state chapter serve to advance sound planning at all levels of government.

Article XIII A of the California Constitution (also referred to in this brief as "Proposition 13") was adopted by the voters in 1978. The APA files this brief in support of Petitioner's challenge to the "reassessment upon sale" provisions of Section 2(a) of Article XIII A of the California Constitution (also referred to herein as the "welcome stranger" provision). Petitioner and the Amici do not challenge the validity of the 1% tax rate cap contained in Section 1(a), nor Article XIII A's other tax limitation provisions which are not relevant here.

The issue pending before this Court is of interest and concern to the APA because its members face the task of guiding community growth for the betterment of all sectors of society. City and regional planning in California is governed by each city and county's general plan. This document, required by California Government Code section 65300 *et seq.*, must describe each community's plan for growth and identify strategies for achieving statewide goals such as affordable housing and a healthy balance between jobs and housing. General plans must also set forth a program which identifies how infrastructure and services will be provided to existing parts of the community and to developing areas. Members of the APA find it increasingly problematic to achieve these goals in the post-Proposition 13 era. It is difficult for them to develop prudent land use and fiscal policies in light of the limited financial resources generated by the property tax, the

inherently unfair treatment of new buyers and the resulting growth in the use of alternative forms of public finance, such as fees.[1]

Historically, the property tax served as local governments' major source of general revenue for the whole range of public services such as police and fire protection. Although local governments' revenues from the property tax have declined since the passage of Proposition 13, APA members find that local governments are still expected to provide the same services. A direct result of Proposition 13 is that newer buyers are now subsidizing longer term owners for the same public services.

APA members also now frequently confront the fact that the fiscal implications of Proposition 13, instead of sound planning policies, can drive many land use decisions. Studies of the "fiscalization" of land use by the California Senate Office of Research and academics studying local government and tax policy in California, suggest that local officials are now more likely to approve developments which are high revenue generators, such as auto malls (which are rich in sales tax revenues), over ones which are low revenue generators, such as housing.[2]

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[1] California Senate Commission on Property Tax Equity and Revenue, *Report to the California State Senate* 48 (1991) (hereinafter the *"1991 Senate Report")*. A copy of this document has been lodged with the Clerk for the convenience of the Court.

[2] *Id. See also,* Chapman, *The Impacts of Proposition 13 on Urban Development and Land Use,* Proposition 13 A Ten Year Retrospective 15-5- (F. Stocker ed. 1991); Misczynski, *The*

(Continued on following page)

The problem can be illustrated using housing as an example. Over time, the property taxes generated by a house, limited to a 2% increase per year, cannot keep pace with the increase in the government's cost of providing services, which rises due to inflation and increasing demand.[3] Local governments are now in the difficult position of approving developments contingent upon either (a) high development fees, (b) a willingness to provide subsidized services below cost, or (c) linking housing to other kinds of "profitable" development.[4] This paradox frustrates local governments' ability to meet goals for balanced land use, infrastructure and housing affordable to all income groups, as required by state general plan law.

III. SUMMARY

In submitting this brief, the APA incorporates the Statement of Facts from Petitioner's brief. This brief will focus on points unique to the APA, whose primary concerns are in the area of taxation of residential properties. However, the Amici recognize that owners of commercial/industrial property, businesses and renters are also affected by the repercussions of Proposition 13, as discussed in Part IV.B. below.

(Continued from previous page)

Fiscalization of Land Use, 3 California Policy Choices 73 (1986). Copies of these documents have been lodged with the Clerk for the convenience of the Court.

[3] *1991 Senate Report* at 48.

[4] *Id.*

Article XIII A of the California Constitution establishes that real property that existed in 1978 is assessed at its 1975 fair market value, unless later sold. At the time of sale, the property's assessment is determined by its acquisition price. A uniform tax rate of 1% is applied to the assessed value, with a result that over time, properties of equal current *value* are subject to disparate tax liability if acquired at different points in time. While providing for nominal (2%) increases in assessed value after sale, Article XIII A lacks any mechanism for bringing the assessed value of similar properties in the same class into reasonable parity over any period of time.

While ostensibly neutral in appearance, Section 2(a) has institutionalized disparate tax liability for California residents and businesses. In has created classes of winners and losers, the winners being the property owners of longest continuous ownership. Among existing taxpayers, a recent statistical sampling of owner-occupied units indicated that over 2 million California homes retained a 1975 base tax year, qualifying those owners for the lowest standard assessed value.[5] Those owners in the first class receive this tax benefit without regard to the current value of their property, the cost of services, or the owners' ability to pay taxes. In contrast to the 2 million winners, the losers numbered at least 2.5 million. By 1988, the earlier class of home owners paid about 24% of all property taxes paid by the home owners, while the latecomers shouldered 75% of the burden.[6]

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[5] *Id.* at 33.

[6] *Id.* at 33.

The early class of benefitted residents is currently followed by thousands of classes of late comers, each class representing the date of acquisition and the specific characteristics of the individual transaction. Moreover, this number of classes grows every day. As between these various classes, the former class receives the greatest benefits, and the newest class "enjoys" the least, until followed by later classes whose only distinction is that they bear an even greater level of tax liability. The earliest classes receive the greatest subsidy because they pay the *least* for the *exact same services as those that are provided* to later buyers. The later classes pay higher taxes which subsidize the costs of services to the earlier classes.[7] Many members of the later classes never had the opportunity to be in the first class because they were too young or could not afford to own property in 1976, or they did not live in California at the time.

Between 1975 and 1989, the median-priced home in California jumped from $41,690 to $196,521: a 371% increase. Taking into account the annual 2% per year increase permitted by Article XIII A Section 2(b), the effective tax liability between two property owners in 1989, one of whom retained a 1975 tax base, and the other who was a recent purchaser, was $514 and $2,028 respectively. This represents a 1989 tax savings of $1,514 to the

[7] In *Nollan v. California Coastal Commission*, 483 U.S. 825, 835, n.4 (1987) this Court noted that where certain citizens are singled out to bear a burden that remedies problems, although they had not contributed to the problems more than other citizens, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause.

person who owned property in 1978.[8] Absent a sale of either property, the differential treatment is perpetuated every year thereafter. If the house with the 1975 tax base sells, the new owner will have to pay the new tax, at a rate of 1% of the acquisition value at the time of sale. This automatic, arbitrary increase will occur regardless of whether the buyer has any more ability to pay than the seller who enjoyed the 1975 tax base for at least 13 years.

As a result of its members' daily experience in community planning, the APA believes that the inequities and burdens of Proposition 13 are greater and more complicated than those presented to the court by Petitioner. In her brief, Petitioner focused on the inequity experienced buying an older home in an existing neighborhood. However, the inequity experienced by the Petitioner represents only a portion of the disproportionate tax burden placed on purchasers of homes in new subdivisions. Local governments have attempted to offset the direct reduction in property tax revenue caused by Proposition 13 by shifting to alternative revenue sources in order to meet the public's demand for municipal services.[9] These alternative revenue sources include fees and assessments. Developers of new homes are often forced to create special financing districts so that the additional fees and assessments may be charged to the new buyers and later

[8] *1991 Senate Report*, at 32, Table 7.

[9] Cal-Tax, *Local Public Finance, Tax and Fee Explosion*, Cal-Tax Research Bulletin 1 (October, 1991). A copy of this document has been lodged with the Clerk for the convenience of the Court.

residents.[10] The cumulative effect of the reassessment on sale provisions of Section 2(a), coupled with supplemental fees, special taxes or assessments, adds even more weight to the tax burden borne by later property owners. The burden is disproportionately felt by home buyers in new subdivisions.

This Court addressed a taxation practice with incidence similar to Article XIII A in *Allegheny Pittsburg Coal Co. v. County Commission of Webster County, West Virginia*, 488 U.S. 336 (1989), and determined that such a practice violated the Equal Protection Clause. That case however, involved the aberrant practice of one tax assessor, and this Court specifically left undecided the constitutionality of California's assessment practice under Article XIII A. 488 U.S. at 344-345, n.4. The traditional grounds relied upon in prior Supreme Court decisions upholding states' tax practices cannot save Section 2(a) from its inherent destructive forces, notwithstanding either its superficial appearance of uniformity or its status of enactment as statewide legislation. Section 2(a) creates too many permanent classes not based on any reasonable distinction. Furthermore, there is no method to seasonably attain rough equality in tax treatment. Finally, the public policies espoused by Respondents do not provide a rational basis for the disparities. For these reasons, based on prior holdings by this Court in cases such as *Allegheny, supra*,

[10] California Debt Advisory Commission, *Mello-Roos Financing in California* 37-38 (1991). A copy of this document has been lodged with the Clerk for the convenience of the Court.

and *Zobel v. Williams*, 457 U.S. 55 (1982), Amici request this Court to invalidate Section 2(a).

IV. ARGUMENT

A. SECTION 2(a) OF ARTICLE XIII A VIOLATES THE FEDERAL EQUAL PROTECTION CLAUSE

1. Action by this Court is Necessary to Address the Inequities

This Court is the only effective forum available to address the constitutional issues raised by Article XIII A of the California Constitution. Immediately following voter approval, a challenge to Proposition 13 was presented to the California Supreme Court in *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208, 149 Cal.Rptr. 239 (1978). In order for county tax assessors to promptly act upon their obligation to implement or ignore the new assessment procedures, the California Supreme Court issued an opinion upholding the constitutional amendment against a number of challenges, including a claim that the provision violated the federal Equal Protection Clause (Amendment XIV, Section 1). *Amador Valley* at 248, 149 Cal.Rptr. at 259. The Court upheld the measure. However, it was unequivocal about the limited nature of its ruling:

> "We further emphasize that we examine only those principal, fundamental challenges to the validity of Article XIII A as a whole. In doing so we affirm and readopt an analytical technique previously used by us in adjudicating attacks upon similar enactments, in which 'Analysis of

> the problems which may arise respecting the interpretation or application of particular provisions of the act should be deferred for future cases in which those provisions are more directly challenged'."

22 Cal.3d at 219, 149 Cal.Rptr. at 241 (*quoting County of Nevada v. MacMillen*, 11 Cal.3d 662, 666, 114 Cal.Rptr. 345, 347 (1974)).

The *Amador* court proceeded to examine the equal protection challenge only in the abstract, and determined that the "resolution within the framework of an actual controversy wherein the disparity is pivotal" was a separate question. *Id.* at 233, 149 Cal.Rptr. at 250. The State Court of Appeals, when it reviewed this case, misinterpreted the earlier *Amador* decision to encompass an "as applied" challenge as well, and declined to reach a different result. *Nordlinger v. Lynch*, 225 Cal.App.3d 1259, 1272-1275, 275 Cal.Rptr. 684, 691-693 (1990) (review denied February 28, 1991). The Appellate Court in *Nordlinger* also concluded that the Proposition 13 tax system was distinguishable from that in *Allegheny*, 488 U.S. 336 (1989), and that the Proposition 13 tax scheme was consistent with the equal protection principles articulated in *Allegheny*. *Nordlinger*, 225 Cal.App.3d at 1278-1279, 275 Cal.Rptr. at 695-696.

Based upon these prior holdings, and without action by this Court, the pyramid scheme of tax liability created by Article XIII A, Section 2(a) will continue ad infinitum. Earlier property owners at the top of the pyramid will continue to depend on later buyers at the bottom to

shoulder an ever-greater share of the costs of public services and infrastructure that serve *everyone* in the community.

2. Section 2(a)'s Method For Creating Different Classes Of Taxpayers Does Not Survive Scrutiny Under The Rational Basis Test.

a. The Unlimited Number of Classes Created by Section 2(a) is Not Permissible.

Section 2(a) violates the Equal Protection Clause because it separates property owners into an ever-expanding number of classes and determines the tax liability differently for each distinct class. Such an approach, one of unlimited class creation, was rejected by this Court in *Zobel v. Williams*, 457 U.S. 55, 64 (1982).

By Respondent's own admission, Section 2(a) has created over 5,000 different classes based simply on date of acquisition. In reality however, many more classes have been added and the numbers continue to expand due to the growing number of permutations allowed by the original statute and subsequent amendments. For example, Section 2(g) of Article XIII A, added by Proposition 58 in 1986, exempts transfer within the immediate family from the change-in-ownership requirements of Section 2(a). Thus, family homes and businesses can be passed in perpetuity, immune from reappraisal. The tax liability will remain the same without regard to the acquisition price, the cost of services provided to the property or the ability of the owners to pay. Similar immunities exist for transfers among joint tenants.[11] Also, Section

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[11] Cal. Rev. & Tax Code § 65(b), (d).

2(h) permits residents over 55 years old who owned property in 1978 to sell that property, buy another property and *transfer* the low 1975 assessment to their new residence – again without regard to the acquisition price, the cost of providing public services to the new residence or the owners' ability to pay.

Numerous arbitrary exemptions also apply to nonresidential transfers. For example, if property is acquired by purchase of stock in the entity holding title to the property, a single individual or entity must acquire over 50% of the stock in order to trigger a reassessment.[12] But, if a corporation reorganizes, a 1% difference in the stock holdings before and after the reorganization will trigger reappraisal of 100% of the real property held by the reorganized corporation.[13]

Thus, there is endless creation of classes, each class determined by the date of acquisition, the acquisition price and the specific circumstances of the individual transaction. Frequently, the most important variable in the equation is whether someone in the transaction owned the property in 1978. This one simple fact can act to keep the property tax abnormally low. This is precisely the type of scheme that this Court condemned in *Zobel v. Williams*, 457 U.S. 55 (1982). As Chief Justice Burger stated when he wrote for this Court:

> If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a

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[12] Cal. Rev. & Tax Code § 64(c).

[13] Cal. Rev. & Tax code § 62(a).

> sliding scale based on years of residence – or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? *Could states impose different taxes based upon length of residence?* Alaska's reasoning could open the door to state apportionment of other rights, benefits, and other services according to length of residency. *It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.*

457 U.S. at 63-64 (emphasis added).

Just as in *Zobel*, Proposition 13 creates an ever-expanding number of classes, based on "length of residency." Also, as in *Zobel*, long-time owners under Proposition 13 are conferred the benefit of subsidized public services based purely on their length of residence, and new buyers can never achieve the same benefit. These results are clearly impermissible.

b. The Class Distinctions of Section 2(a) Are Not Reasonable.

This Court has repeatedly determined that a state tax law is not arbitrary even if it "discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a *reasonable* distinction, or difference in state policy and [is] not in conflict with the Federal Constitution." *Kahn v. Shevin*, 416 U.S. 352, 355 (1974), *citing Allied Stores v. Bowers*, 358 U.S. 522, 528 (1959) (emphasis added).

Based on the standard described above, this Court has upheld distinctions between individuals and corporations (*Lehnhausen v. Lake Shore Auto Part Co.*, 410 U.S. 356, 365 (1975)); between sizes of corporations (*Fox v. Standard Oil Company of New Jersey*, 294 U.S. 87, 100 (1935)); between widows and widowers (*Kahn, supra*); and between utilities and other business units (*New York Rapid Transit Corp. v. New York*, 303 U.S. 573, 579 (1938)). There is no doubt that Proposition 13 could have followed those classifications or created similar new classes with different attendant tax liabilities using *reasonable* distinguishing features such as: differences between vacant and developed lands; residential and commercial properties; single family and multifamily units; or relative size of parcels, combined with availability of improvements and relative current economic values.

Simply stated, Section 2(a) operates without any "*reasonable* distinction or difference." *Allied Stores v. Bowers*, 358 U.S. 522, 528 (emphasis added). There is *no* connection between costs of providing services to properties, the owners' ability to pay and the tax assessment. Even the acquisition price does not determine the tax assessment if the transaction falls into one of the Proposition 13 exceptions that favor 1978 owners, such as the Section 2(h) provision that allows 1978 owners who are over 55 years old to transfer the low 1975 assessment to a new residence. Thus, distinctions between tax burden borne by different classes of property owners are not based on any reasonable consideration of difference or policy. Because Proposition 13 contains no such reasonable distinctions, it violates the Equal Protection Clause. *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910), *cited in Allegheny, supra*, 488 U.S. 336, 344.

c. Section 2(a) Does Not Provide Seasonable Attainment of Rough Equality in Tax Treatment.

Proposition 13 fails to provide "seasonable attainment of a rough equality in tax treatment of similarly situated property owners." *Allied Stores v. Bowers*, 358 U.S. 522, 526-527, *cited in Allegheny, supra*, 488 U.S. 336, 343. Article XIII has been creating assessment disparities for the past 13 years, and there is no mechanism in Article XIII to ever bring similarly situated properties and owners into rough equality. Proposition 13 supporters claim that the provisions in Article XIII A allow taxes to be raised according to a formula that somehow helps it to seasonably attain rough equality under the Equal Protection Clause. This argument is transparent. The fact that a 2% increase is permitted, does not come close to meeting the requirement that rough equality in tax liability be attained over a reasonable period of time. Disparities between recent buyers and long-term owners have already reached 13:1 on some areas of California, and projections indicate that the differential will rise to at least 26:1 within 10 years if the "welcome stranger" provision in Section 2(a) is not struck down by this Court. *Nordlinger v. Lynch*, 225 Cal.App.3d 1259, 1269, 275 Cal.Rptr. 684, 689 (1990).

Also, although Sections 3 and 4 of Article XIII A supposedly supply an internal mechanism to raise taxes to spread increased costs of government services, they

require a "super majority" vote in order to levy any new state or local tax increases. These sections also forbid new ad valorem taxes on real property. By imposing this two-thirds voting requirement, the drafters of Proposition 13 hoped to restrict the ability of local governments to impose new taxes in order to replace the property tax losses created by Proposition 13's new tax scheme. In practice, the two-thirds vote has deterred the adoption of taxes to provide infrastructure and services in existing areas.[14] For example, the Mello-Roos Community Facilities Act of 1982, California Government Code section 53300 *et seq*. permits local governments to adopt a special tax to finance public facilities and services. This tax is hardly ever used in existing areas because of the two-thirds vote requirement. However, in areas that have not yet developed, the tax can be imposed by the landowner/developer before the residents move in. A study by the California Debt Advisory Commission indicates that of 132 Mello-Roos districts recently created, all but five were used for vacant land by the landowner/developer.[15]

d. None of the Public Policies Espoused by the Respondents and Authors of Proposition 13 Justify Its Unfair Impacts and the Policies Do Not Withstand Rational Basis Scrutiny.

Proposition 13 proponents claim that the welcome-stranger provision of Article XIII A reflects ability to pay.

[14] California Debt Advisory Commission, *Mello-Roos Financing in California* 1 (1991).

[15] *Id.* at 13, n.1.

In fact, the scheme was never designed to impose property taxes with respect to ability to pay or cost of services. As fully explained in Petitioner's brief, first time home buyers in modest neighborhoods are now paying property taxes and fees far higher than long-time homeowners in wealthy areas. The *only* distinguishing factor is date of purchase. Proponents of Proposition 13 do not explain what is the characteristic of new buyers that justifies their disparate treatment. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 453 (1985).

Proponents of the welcome-stranger provision also allege that its "predictability" justifies gross disparities in tax payments by similarly situated property owners. *Predictability is not the benchmark of fairness or equal treatment*. Taxpayers and the State may have a legitimate interest in "certainty," but this does not justify assigning similarly situated taxpayers different tax burdens simply based on the acquisition *date* and *price* at which they purchased or merely because one taxpayer received his or her home through a transfer that is exempt from Proposition 13's reassessment trigger. There is simply no reason why recent buyers must pay higher taxes in order to achieve predictability. Such an explanation is necessary to pass judicial scrutiny under the Equal Protection Clause. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 453 (1985).

Another justification offered by the Proposition 13 authors is that forcing newer buyers to shoulder more of the tax burden is necessary in order to guarantee a

constant revenue stream for local government.[16] Again, Respondents and Proposition 13 advocates can not explain what characteristic of new buyers justifies making them pay a higher proportion of the cost of public services and infrastructure than their longer-term neighbors. They also have not explained what characteristic of long-term owners entitles them to a subsidy. Plainly and simply, there is no rational basis for the distinction between the classes of taxpayers.

B. THE TAX INEQUITIES RESULTING FROM SECTION 2(A) ARE FURTHER COMPOUNDED BY THE ACTS OF LOCAL GOVERNMENTS AS THEY SEEK SUBSTITUTE REVENUE SOURCES.

As previously noted, the direct result of Section 2(a) is disparate tax treatment of similarly situated properties. This well documented gap will only widen with the passage of time unless checked by this Court. The difference in tax burdens carried by recent purchasers compared to earlier purchasers is further compounded when reviewed in conjunction with the other revenue actions of local governments.

In California, property tax is not the sole source of revenue to cities and counties. Rather, there is a wide range of sources, including the subsidies and reimbursements by state and federal government. Of those which are adopted and controlled by local government, the

[16] *See*, Brief *Amici Curiae* of Howard Jarvis Taxpayers Association and Paul Gann's Citizens Committee in Opposition to Petition for Certiorari, at 4, 7-8, 16.

major revenue sources are general property taxes, sales tax, property transfer and transient lodging tax, business license tax, utility user taxes, service charges and licenses, permits and franchises. In 1977-1978, the predominant source of locally generated income to local governments was the general property tax, the tax now specifically limited by Section 2(a) of Article XIII A.[17] Although Proposition 13 caused a substantial reduction in local governments' historic revenue source, local governments have responded in part by shifting to substitute funding methods. The substitute sources that compound the discriminatory burden of Article XIII A are in the areas of special taxes, benefit assessments and development fees.

This drive for new non-property tax revenues is a function of cities and counties responding to constituent demands for services. Not surprisingly, California voters' appetite for services did not diminish along with their willingness to pay property taxes. Even the disproportionately high property taxes paid by recent purchasers do not make up the difference between the costs of services and the amount of revenue raised by the property tax. The desire for services, coupled with underfunded state and federal mandates, have left local governments with no choice but to seek alternative funding. For various reasons, the brunt of the new revenue techniques, whether taxes, fees or assessments, is borne by the residents of developments built after passage of Proposition 13. Thus, not only do recent purchasers enjoy the "privilege" of paying higher Section 2(a) property taxes, they

[17] Cal-Tax, *Local Public Finance, Tax and Fee Explosion*, Cal-Tax Research Bulletin 4 (1991).

often pay additional fees, special taxes and assessments as well.[18]

Fees can be a deterrent to affordable housing, particularly in new developing areas, because they are usually imposed on a per-unit basis, not as a percentage of the value of the home. One consequence of high fees is that developers sometimes opt to build housing only for the higher end of the single-family market where fees can be absorbed more easily as opposed to multi-family projects (usually rentals). A recent study by the U.S. Department of Housing and Community Development indicates it is easier for developers to pass the fees along to home buyers than to renters. This preference can have a dampening effect on the development of multi-family housing.[19]

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[18] Ironically, after this Court issued its decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the California legislature adopted section 66000 *et seq.* of the California Government Code (also known as "AB 1600"). Before local governments can impose fees, this legislation requires them to conduct exhaustive studies and show a specific nexus between the demand for public services and infrastructure created by the new unit, the cost of the service and/or infrastructure, and the fee charged to the home buyer. In contrast, the amount of the property tax imposed on the new home buyer by Section 2(a) undergoes no such scrutiny.

[19] U.S. Department of Housing and Community Development, *"Not In My Backyard" Removing Barriers to Affordable Housing*, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing 2-11 (1991) (*citing* Ferguson, *How Impact Fees Affect Residential Development* (January, 1991). Prepared for the Urban Land Institute. Draft.) A copy of this document has been lodged with the Clerk for the convenience of the Court.

Three recent studies chronicle the shift to fees, special taxes and assessments. The first study is by Cal-Tax, a non-profit corporation founded to advance further understanding of California's system of taxation.[20] Cal-Tax's study shows that in comparing 1988/89 to a base year of 1977/78 (the year preceding Article XIII A's enactment), parcel taxes and benefit assessments (both exempt from Proposition 13) imposed by cities, counties and special districts, have increased 785%.[21] On a per capita basis, these taxes and assessments have jumped from $1.84 to $10.73 during the ten year span of the Cal-Tax study. Most often, these assessments or special taxes are required by local government in conjunction with approval of new real estate developments. Another recent study, cited above, by the California Debt Advisory Commission, shows that debt financing for public facilities carried by all Mello-Roos districts now totals $3.2 billion. Most of this debt has been imposed on new developing areas and buyers are expected to assume much of the burden when they move into new subdivisions.

A third study that addresses development fees was recently compiled by the Building Industry Association of Northern California.[22] It also clearly demonstrates

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[20] Cal-Tax, *Local Public Finance, Tax and Fee Explosion*, Cal-Tax Research Bulletin (October, 1991).

[21] *Id.* at 3, Table 1.

[22] Building Industry Association of Northern California, *Development Fee Survey for the San Francisco Bay Region* (1991). A copy of this document has been lodged with the Clerk for the convenience of the Court.

the unmistakable shift by local governments to alternative funding sources. In this case, the focus of inquiry is on residential development fees, which are those fees imposed by local government on construction of new homes. This survey examined the probable fee structure to be encountered by a developer processing a 25 acre development, consisting of 100 single family detached homes with four different models. The survey area consisted of fifty-six cities in the San Francisco/Oakland greater metropolitan area.[23] The study results graphically document the burden shifting to the new home buyer. This study shows average development fees per home[24] for the three survey periods of 1981, 1987, and 1991 amounting to $4,264, $9,220, and $13,763, respectively; a 223% increase from 1981-1991.[25] By practice, existing residents are exempt from these one time fees, since the fees apply only to new construction.[26]

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[23] Located on a 6000 square foot lot, each hypothetical home consists of three bedrooms and two baths with 1500 square feet of living space. Each prototype also includes a 400 square foot garage.

[24] Individual fees that were estimated for the prototype homes are in the following categories: Planning; Building; School Impact; Traffic Impact/Parks-Recreation-Open Space; Fire and Police; Affordable Housing; General Growth; and Utility.

[25] Building Industry Association of Northern California, *News Release* (August 14, 1991). A copy of this document has been lodged with the Clerk for the convenience of the Court.

[26] Many of the studied fees, but not all, would also apply to an individual seeking to construct a single home on an existing parcel of land.

As the above studies indicate, the inequities created by the reassessment on sale provisions of Proposition 13 are not limited to the payment of the property tax only. California cities and counties have resorted to alternative revenue sources to compensate for the revenue decreases caused by Proposition 13. A significant burden in the form of special taxes, assessments and fees is transferred to residents of developments built in the post Proposition 13 era. New homebuyers are incurring the extra burden of this revenue shift, adding even more barricades to mobility and affordable housing on top of the direct penalty placed on new residents as a consequence of Section 2(a).

V. CONCLUSION

Petitioner Nordlinger has presented compelling documentation of the tax inequities presented by Section 2(a) of Article XIII A of the California Constitution. No party to this petition can dispute this conclusion. It is also well documented that the burden placed on home purchasers in new real estate developments approved after Proposition 13 has risen beyond the increased property tax liability imposed by Section 2(a).

Home buyers so burdened have no remedy under state law. The straight-jacket valuation and assessment methodology mandated by Section 2(a) locks a newer purchaser into permanent disparity, and lacks any means for seasonable closure of the tax gap. Theoretically, a taxpayer may avoid the inequitable treatment by never changing tax status. In reality, it is difficult or impossible

to avoid the discriminatory effect. Public policy justifications espoused by Proposition 13 advocates, such as tax certainty, are achievable without penalizing those who elect or are forced to purchase a new home or business property. Amici find that the inequities created by Proposition 13 are growing. As California moves into the twenty-first century, it will become increasingly difficult for local governments to conduct sound land use planning and provide public services and facilities on a fair basis. It is for the above reasons that Amici request this Court to invalidate Section 2(a) of Article XIII A of the California Constitution.

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Respectfully submitted,

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